

**MAY 13 2005****NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO AGUILAR,

Petitioner-Appellant,

v.

E. ROE, Warden,

Respondent-Appellee.

No. 03-56965

D.C. No. CV-02-00481-MJL

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
M. James Lorenz, District Judge, Presiding

Submitted May 9, 2005\*\*

Before: PREGERSON, CANBY, and THOMAS, Circuit Judges.

California state prisoner Francisco Aguilar appeals pro se the district court's judgment denying his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo, *see Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003), and we affirm.

---

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Aguilar contends that he received ineffective assistance of counsel because counsel refused the state court's offer to instruct the jury on lesser included offenses. On direct review, the California Court of Appeal rejected this argument, concluding that counsel's decision was a reasoned tactical decision, and, that there was no evidence of prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). This decision was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d); *see also Butcher v. Marquez*, 758 F.2d 373, 376-77 (9th Cir. 1985) (concluding that counsel's failure to seek jury instructions inconsistent with his reasonable choice of defense does not constitute ineffective assistance of counsel).

**AFFIRMED.**